FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-742

JEROME MILLER, Individually and as Director of THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES and THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES of the STATE OF ILLINOIS.

Appellants.

vs.

MARCEL YOUAKIM and LINDA YOUAKIM individually and as foster parents, TIMOTHY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, MARY LOU ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, LARRY ROBERTSON, a minor, by his sister and next friend LINDA YOUAKIM, and SHERRY ROBERTSON, a minor, by her sister and next friend LINDA YOUAKIM, and all others similarly situated,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I.

THE ILLINOIS STATUTORY FOSTER CARE SCHEME IS CONSISTENT WITH THE PROVISIONS OF THE SOCIAL SECURITY ACT.

The State of Illinois recognizes that once a state decides to participate in the federal public welfare program, "aid to families with dependent children [must] be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10); *Carleson* v. *Remillard,* 406 U.S. 598, 32 L. Ed. 2d 352 (1972). As is apparent in this case, Illinois does not deny public assistance to persons who care for related dependent children.

Likewise, it is not questioned that eligibility for AFDC or AFDC-FC is to be determined by reference to the federal eligibility standards rather than by each individual state's preference. (See Pl. Br. pp. 13-14; U.S. Br. p. 7). Simply stated, the question here is whether persons caring for needy dependent children are eligible for public assistance under the basic AFDC program, the more recently added AFDC-FC program or, as must logically follow from plaintiffs' position, both programs. The defendants maintain that the state has properly applied the federal eligibility standards to the plaintiffs in this case and appropriately found them eligible for AFDC benefits. Because public assistance is clearly available to persons situated like the plaintiffs in the basic program, Congress did not intend that they be covered again under the separate AFDC-FC program.

A.

Plaintiffs Are Clearly Eligible For Federal Assistance Under The Basic AFDC Program.

Plaintiffs do not deny that they meet the federal eligibility requirements under the basic AFDC program. For purposes of this case, only two conditions for eligibility exist under that program. First, a child must be deprived of parental support because of the death, continued absence or physical or mental incapacity of a parent. Without question, the minor plaintiffs meet this requirement. Secondly, a child must reside with his parents or certain specified close relatives. Because the minor plaintiffs live with their sister, they also meet this requirement. Since both conditions have been met, the plaintiffs are, therefore, eligible for welfare benefits under § 406.

Plaintiffs are eligible under the basic program despite the fact that the minor plaintiffs have been placed in the related home as wards of the state. A court ruling that a child should be removed from the home of a parent or relative and made a ward of the state does not now affect, and never has, a family's eligibility under the basic AFDC program. So long as a child lives in the home of a specified relative and has been denied parental support for any of the above-mentioned reasons, he is entitled to assistance under § 406. The federal regulations governing the basic AFDC program strongly support this position. These regulations consider a child to be "living with" a relative even though:

> (1) *He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or*

(2) *Legal custody is held by an agency that does not have physical possession of the child.*

45 C.F.R., § 233.90(c)(1)(v)(B).[1]

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1. In their brief submitted to the Court of Appeals, plaintiffs dismissed this regulation as "irrelevant." Plaintiffs now argue that the regulation refers to a "large group of children" removed from their own homes and under state supervision who, whether living with relatives or non-relatives, are not eligible for foster care under § 408 because they were not eligible for regular AFDC in the homes from which they were removed; purportedly the above regulation merely describes regular AFDC eligibility for these children. (Pl. Br. p. 68) Plaintiffs cannot be suggesting that children removed from non-eligible homes and subsequently placed with non-relatives are made eligible under the regulation for regular AFDC assistance, since one of the specified requirements for AFDC is that a child live in a related home. Plaintiffs must be referring to children removed by court order from non-eligible parental homes and placed with relatives. If there is a deprivation of parental support in this situation for any of the reasons stated in the Social Security Act, such children are of course eligible for AFDC so long as they live with relatives. The regulation applies to all needy children, including plaintiffs, who live with relatives, even though legal custody is held by the state agency. It also clarifies that HEW does not regard a court order as the distinguishing factor for determining AFDC-FC eligibility, since that factor may be present when a child is entitled to AFDC.

The Solicitor General readily acknowledges that the above regulation does provide coverage under the basic AFDC program for a relative caring for a child held in legal custody of a state agency. (U.S. Br. pp. 12, 18) The fact that AFDC-FC coverage would "in these circumstances overlap with the basic AFDC coverage" constitutes the precise issue in this case, and cannot be dismissed simply by reference to HEW regulations allowing a family to choose whichever plan they find more desirable.

In short, the fact that the minor plaintiffs have been adjudicated state wards does not vitiate the reality that plaintiffs are literally covered under the basic AFDC program.

As plaintiffs note, Congress extended eligibility under the basic AFDC program in 1961 to "include" the child who lives with a specified relative, but who is deprived of parental support because of the unemployment of his father. (42 U.S.C. § 607) Even under this extended program, however, a child could receive assistance only if he was living with a relative. An entire group of needy dependent children, therefore, absent additional legislation, would have remained ineligible under the federal AFDC program. These are children who, although deprived of parental support because of the death, absence, incapacity, or unemployment of a father, are unable to live with relatives. The foster care program pertains directly to these children. While the basic AFDC program only provides aid to children who reside in the homes of relatives, § 408 changes the definition of a needy dependent child to *include also* one who would meet the requirements of § 406 or § 407, *except that he has been removed* from the home of a § 406 relative and has been placed in a "foster family home" or in a "child-care institution."

As plaintiffs correctly note, § 408 does not explicitly exclude related children from coverage under the foster care program. (Pl. Br. pp. 36, 47) This fact is, of course, in no way determinative of the issue involved here. The approach of presuming coverage under any federal assistance program has been firmly rejected by this Court, and the ordinary principles of statutory interpretation must be applied. *Burns* v. *Alcala*, 420 U.S. 575, 43 L. Ed. 2d 469, 475 (1975).

As previously discussed in the State's brief (pp. 21-22), these principles require that § 408 be read in conjunction

with § 406, and not as though the foster care provision stood in isolation, as is done by plaintiffs. Indeed, § 408 by its very terms necessitates a reference to § 406. Section 408(a) states that "notwithstanding Section 606(a)", the term "dependent child" shall "also include" a child removed from the home of a relative and placed in a foster family home or child care institution. Given its normal meaning, the phrase "also include" used in § 408 signifies an addition of some sort. In the context of the Social Security Act, related care was already covered under § 406; "also include" must, therefore, refer to the additional category of unrelated child care. As shown above, if a child is removed from the home of one § 406 relative and placed in the home of another § 406 relative, with or without a court order, he is entitled to AFDC assistance. The only reasonable explanation for the later enactment of § 408 is that Congress intended to reach a group of children not otherwise entitled to AFDC assistance—that is, needy dependent children who are placed somewhere other than in the home of a § 406 relative.

In addition, § 408(f) specifically requires assurance by the state that once a child is placed in a "foster family home," efforts will be made to either improve the conditions of the home from which he is removed or to otherwise "make possible his being placed in the home of a relative specified in section 606(a) of this title. . . ." 42 U.S.C. § 608(f). This is precisely the situation here: two of the plaintiff children had initially been placed in a foster home; pursuant to § 408(f), the state made it possible to place the children in the home of a relative specified in § 406(a)—their present home. Section 408(f) specifically refers to relatives' families as being a separate category from foster families. Under plaintiffs' construction that foster care is related care, the quoted portion of § 408(f) is rendered

meaningless. If Congress had intended that a separate category of "related foster parents" should constitute an exception to the clear language of § 408(f), it seems certain that Congress would have made some reference to this group of persons. As it now stands, the language of § 408(f) is simply extra verbiage if a child already lives in the home of a § 406 relative which is, at the same time, considered a foster family home.

Both plaintiffs and the Solicitor General (U.S. Br. p. 15) virtually ignore the vital role played by relatives in the maintenance of the family structure when discussing § 408(f). Thus, plaintiffs state on page 54 of their brief that the first goal of long range planning is to return the child to the home from which he is removed, "usually that of his parents." By repeatedly emphasizing the family ties between a child and his parent throughout their brief, and by referring merely implicitly to the role of relatives in the foster care scheme, plaintiffs attempt to establish that care by all persons other than parents constitutes foster care. Under plaintiffs' narrow interpretation that children be returned to the homes of their parents, a child's placement in the home of a relative would be a foster care measure. But this interpretation was clearly not the intention of Congress. Relatives actually stand on the same footing as parents in the foster care scheme. When a child is removed from a relative's home and placed elsewhere, the Social Security Act mandates that the same services be provided to improve the home of a relative as would be provided to improve a parental home if the child had been removed from that home.

Plaintiffs note that the home from which a child was removed cannot always be improved, and plaintiffs correctly state that in those instances child placement should be sought with another relative. (Pl. Br. p. 55) However, plain-

tiffs discuss only "permanent placement" with a relative. Neither § 408(f) nor any federal regulations require a child's placement with relatives to be permanent when the home from which a child is removed cannot be improved. Under § 408(f), it is sufficient that a child is placed "in the home of a relative specified in section 606(a)." As the HEW regulation discussed above makes unmistakably clear, a child will be living with a relative even if that child is under a court's supervision or is in the legal custody of a state agency. (45 C.F.R. § 233. 90(c)(1)(v)(B)). Furthermore, by making a clear distinction between a relative's home and an adoptive home, 45 C.F.R. § 220.19(d) leaves little doubt that placement with relatives need not be on a permanent basis. (See State Br. p. 36) Since the goal of the § 408 program is to aid the child *until* he can be placed with relatives, either on a permanent or temporary basis, it logically follows that the foster care itself is not provided by persons related to the child. In short, the goal of the § 408 program has been met and the child is not in need of foster care but can obtain aid under § 406. Since plaintiffs have been successfully placed by the state in the home of a relative after living in a foster family home, they are no longer foster children under the Social Security Act and are clearly entitled to benefits under § 406.

Assuming that the long range goal of foster care is the permanent placement of the child with a relative, plaintiffs' interpretation of § 408 allowing relatives to serve as foster parents frustrates that goal. If a relative could be a temporary foster parent under § 408, a child living with that relative could receive more aid than he could receive under the basic § 406 program. As a matter of simple economics, assuming that the child's home could not be improved, a relative would have no incentive to adopt the child or to

take permanent, non-supervised custody of him. In fact, there would be an economic incentive for the relative to help the child only on a temporary foster care basis. Similarly, any other relative would not want to adopt the child or take permanent custody of him if the child could obtain more money by living with another "foster relative." Furthermore, if a relative could receive more money under the foster care program, he would have no incentive to voluntarily care for the child under the § 406 basic AFDC program. Rather, that relative would be provided an incentive to wait until the child had been removed from the home of a parent or relative by court order and declared a ward of the state—a process which could adversely affect the child. These considerations provide additional proof that relatives' homes are not considered to be foster homes under the § 408 foster care program.

B.

Congress Did Not Intend That Plaintiffs Be Covered By Both § 406 and § 408.

Plaintiffs evade the fact that they are literally covered under § 406, and rely solely on § 408 to establish their eligibility for federal assistance. That section, standing by itself, does not clarify Congress' meaning of the term "foster family home." Thus, § 408(a) refers to a child who has been removed from a relative's home and placed in a "foster family home," without further explaining that term. Likewise, § 408(b) also includes "foster care" in the "foster family home of any individual" or "child-care institution." Finally, the last paragraph of § 408 simply defines a foster family home as a "foster family home for children" which is licensed or approved by the state. In deciding this case below, the Court of Appeals agreed that

Congress nowhere defined "foster care" for purposes of federal assistance. (J. S., App. B8-9) Without question, a determination of the issue involved in this case must go beyond an examination of § 408 and consider the interaction between § 406 and § 408.

The logical extension of plaintiffs' claim that they are entitled to foster care assistance is that they are covered in two areas of the federal welfare scheme—the basic AFDC program under § 406 and the foster care program under § 408. However, the fact that Congress explicitly provided AFDC for children living with relatives is evidence of a Congressional intent not to include such children in the AFDC-FC program. (See *Burns* v. *Alcala,* 420 U.S. 575, 43 L. Ed. 2d 469, 476 (1975)) While plaintiffs attempt to distinguish this case on the basis that prenatal services under Title V were provided "simultaneously" with AFDC coverage, there is nothing in *Burns* to indicate that this principle does not apply here.

Although plaintiffs are literally covered under the basic AFDC program, they contend that duplicate coverage does not exist, in view of the "additional eligibility criteria" under the foster care program of a court ordered removal from the home of a relative. (Pl. Br. pp. 51-52) This requirement does bar an entire group of children from federal assistance who are removed from their homes without legal action, and are placed in non-related homes. But the requirement does not in itself create plaintiffs' eligibility for foster care assistance. Again, children who were judicially removed from their homes and placed with relatives were eligible for federal assistance long before the foster care program came into being. As plaintiffs themselves note (Br. p. 21), the requirement of a judicial determination that a home is unsuitable was inserted into the foster care program to safeguard children against arbitrary re-

moval in situations where the state disapproved of certain practices within the home. In effect, the requirement simply places the burden on the state to produce sufficient evidence that a home is truly unsuitable. It is not the distinguishing factor for foster care eligibility. The recognition by the Solicitor General that AFDC-FC coverage does indeed overlap with the basic coverage if related persons are to be considered foster parents is certainly a more correct interpretation. (See note 1, p. 4 *supra*)

At the same time as plaintiffs deny duplicate coverage, they appear to suggest that related persons constitute a small group which is eligible for aid under two programs. (Pl. Br. p. 53)[2] This position undoubtedly emerges from

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2. The situation referred to by plaintiffs under the AFDC-U program (42 U.S.C. § 607), and decided in *Philbrook* v. *Glodgett,* 421 U.S. 707, 44 L. Ed. 2d 525 (1975), is not analogous to this case. (See Pl. Br. pp. 53-54). Under the subchapter IV categorical assistance program for aid to families with dependent children (42 U.S.C. § 601 et seq.), a child deprived of parental support because of the unemployment of his father is eligible for financial aid (42 U.S.C. § 607). Pursuant to § 407(b)(2)(c)(ii), AFDC benefits are terminated if the child's father received unemployment compensation under state or federal law. The federal-state unemployment compensation program, operated under subchapter III of 42 U.S.C. is separate and distinct from the subchapter IV AFDC program. In *Philbrook*, the State of Vermont terminated AFDC assistance if a child's father was merely eligible for unemployment compensation. This Court affirmed the lower court decision invalidating the Vermont statute and ruled that a state cannot deny aid under the AFDC categorical assistance program merely because an individual was eligible for a basic amount of aid under the unemployment compensation program.

Unlike that situation, § 406 and § 408 do not establish separate categorical assistance programs, but are rather

(Footnote continued on next page)

plaintiffs' repeated assertions that Congress enacted the foster care program in response to the special needs of children removed from their homes by court order by providing a distinct and superior set of services and benefits "tailored to meet the special needs of neglected, exploited, or abused wards of the state." (Pl. Br. p. 52) Simply stated, plaintiffs view the difference between § 406 and § 408 as a difference between the reasons for a child's deprivation of parental support. Allegedly, children who must be removed from their homes because of abuse and neglect share a "different and greater need" than is met under the basic AFDC program. (Pl. Br. p. 21) According to plaintiffs' theory, "need" under the basic program is only "economic support" because of the death, absence or incapacity of parents; the factor triggering foster care is not economic need, but rather the "special needs of children who have been so neglected in their own homes, that a court has ordered them removed from those homes." (Pl. Br. p. 22)

This theory suggests that Congress was primarily concerned with solving the problem of child neglect or abuse, rather than the problem of economic support of children removed from their homes. If this were the case, there would be no need for a child to be AFDC eligible before he can participate in the foster care program. Yet, Congress has specifically included the requirement that a child first be AFDC eligible. Therefore, the fact that a child is neglected or abused, and consequently removed from a relative's home, is irrelevant for federal welfare purposes. While

(Footnote continued from preceding page)

segments of one categorical assistance plan—the subchapter IV-A program for aid to families with dependent children. Clearly § 408 was not devised as an alternative to § 406, but as a means of including under the AFDC program those children not previously covered through § 406.

Congress was undoubtedly concerned with the plight of abused or neglected children, it is obvious that the neglect or abuse of children was not the catalyst for the enactment of the foster care program. Rather, Congress initiated the foster care program in response to a recognition that once neglected or abused children were removed from the home of a parent or relative, they were no longer entitled to AFDC benefits.

Additionally, plaintiffs overlook the fact that § 406(b) provides for medical care "or any type of remedial care recognized under state law," as well as money payments, on behalf of a needy dependent child or the relative with whom he lives. The only services provided to § 408 children which differ from those provided to § 406 children are found in § 408(f). As previously stated, that section merely provides that a state plan must make provision for periodic review of the child's need to live in a foster home or child-care institution; for assurances that the child receives proper care; for efforts that the home from which a child is removed is improved or he is otherwise placed with a relative; and for the use of certain state employees in placing the child in a foster home or child-care institution. Obviously, such a plan would not be required with respect to children eligible for regular AFDC, since these children are already living in the homes of relatives. Plaintiffs have not shown what other special services are available to children in foster care.

Plaintiffs erroneously state that "substantial additional cash money payments and specialized services" were made available under the foster care program from its inception, which were not provided under the basic program. (Pl. Br. p. 10) There is no indication anywhere that in 1961, when Congress amended Title IV of the Social Security Act to authorize federal matching funds for one year for needy de-

pendent children who were in foster care, any higher funds were allocated for the foster care program, or that Congress considered any unique needs of children removed from their homes by a court order. Congress simply recognized that these newly eligible children had as great a need for economic support as any other needy dependent child, and provided for it. Again in 1962, when Congress made the foster care program permanent, foster care assistance was provided on a matching basis on the recognition that foster care provided "an alternative to leaving children in unsuitable homes or caring for them elsewhere without federal participation." (S. Rep. No. 1589, 87th Cong. 2d Sess. (1962) U.S. Cong. & Adm. News V. 1, 1954.)

In 1967, Congress noted that "[f]oster care for children is relatively costly, and States have reported that they cannot finance it without some additional Federal help." (S. Rep. No. 744, 90th Cong., 1st Sess. (1967) U.S. Cong. & Adm. News V. 2, 3000.) In enacting the foster care program, Congress had already recognized that many needy dependant children are unable to live with their parents or relatives. Logic and established precedent dictate that foster care is more costly than related care for the reason that higher payments must be made to induce persons who have no familial interest in a child, and therefore no particular reason or incentive for caring for the child, to become foster parents. (See *Youakim* v. *Miller*, 374 F. Supp. 1204 (N.D. Ill. 1974))). As plaintiffs note on page 25 of their brief, all states participating in the federal foster care program had, since the beginning of the program, paid higher sums under that program than under the basic AFDC program. The more favorable federal matching in 1967 was a congressional effort to help the states attract as many homes of otherwise disinterested persons as possible, in accordance with the stated congressional purpose of obtaining the "best possible environment for the child." There is no indication that, by allocating higher payments to the states, Congress intended to change the basic structure of the federal assistance program which provided benefits to persons caring for related children, and to bring related persons within the coverage of both the § 406 and § 408 programs.

C.

Congress' Purpose In Enacting § 408 Was Simply To Provide Federal Assistance For A Group Of Children Not Previously Covered Under The AFDC Program.

All of the congressional statements accompanying the foster care amendments in 1961 and thereafter support the position that Congress did not regard related care as foster care for purposes of federal assistance under Title IV of the Social Security Act. (See State Br. pp. 26-32).[3]

In addition, both an analysis of the Flemming Ruling referred to by plaintiffs (Pl. Br. pp. 17-19) and portions of the Congressional Record relied on by plaintiffs support the interpretation that foster care was never intended to be related care for purposes of public welfare.

Insofar as the Flemming Ruling concerns this case at all, that Ruling was issued by HEW to counteract the position taken by several states that unsuitable homes (i.e. homes in which illegitimate children were born subsequent to the

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3. It may be noted that the district court below, 431 F. Supp. 40 (N.D. Ill. 1976), in part based its decision, without elaboration, on the legislative history of the Social Security Act as one ground for invalidating the Illinois foster care scheme. The weakness of this ground is indicated by the court of appeals' subsequent failure to adopt it. (562 F. 2d 483 (7th Cir. 1977)).

receipt of assistance) were ineligible for AFDC. In other words, states were attempting to use welfare legislation as a means to protect moral values of families. The Flemming Ruling represents HEW's considered judgment that welfare eligibility should not be controlled by the moral value judgments of the states, but rather by the deprivation of parental economic support for reasons designated in the Social Security Act.

The Flemming Ruling had ordered the states, as of July 1, 1961, to continue welfare assistance while making efforts to either improve the home from which a child was removed, or place the child elsewhere. As a result, the states were faced with the dilemma that, if a child were removed from an unsuitable home and placed in the home of a § 406 relative, federal aid would still be forthcoming; however, if the original "unsuitable" home of the child could not be improved and a § 406 relative could not be found, the states had two choices—either to leave the child in the "unsuitable home" to insure continued federal funding, or to place the child in a non-related home and lose federal AFDC matching funds. The problem was described as follows:

> At present under the aid to dependent children program the child must live in the home of a parent or a close relative.
>
> * * *
>
> Care for children away from their own homes in foster family homes is not available throughout the country and varies widely among the localities. While Federal funds available through the child welfare services to States under title V are used for foster care of children to a limited extent, the bulk of the cost of foster care is paid from public funds, State or local, or from funds of voluntary agencies. The lack of financial resources for such care has hindered the development of the most suitable care for children who have to be cared for outside their own home. (S. Rep. No. 165, 87th Cong. 1st Sess. (1961) U.S. Cong. & Adm. News V. 2, 1721)

Congress responded to this situation by amending Title IV to authorize matching funds for one year for needy dependent children who were living in foster homes. During the congressional discussion of the foster care amendment relied on by plaintiffs, it was noted that the courts were frequently hesitating to move children from their natural homes, even though the conditions there were adverse to the children, "if by moving them to a foster home they would lose the aid and would become a welfare charge on the local relief agencies whose programs are financed 100 percent by local or State funds." 107 Cong. Rec. 6387 (1961) (Remarks of Sen. Kerr). Obviously, if a child were removed from its natural home and placed in the home of a relative, federal assistance would still have been forthcoming. By describing a foster home as one which would "lose the aid," Senator Kerr, at least, must have regarded a foster home as an unrelated home.

Further comments on the foster care amendment at that time state that its "sole purpose" was to remove the psychological barrier of "fear of an increase in local cost," so that the courts could consider the welfare of the child "free from any apprehension that by moving it the court would reduce the amount of money that would be available for the child's care." *Id.* It bears repeating that no aid would have been lost or reduced if a child was placed with a relative. However, the full cost of caring for the child would fall upon the states if the child was placed with non-relatives. As plaintiffs note (Pl. Br. p. 24), the foster care program initially pertained only to foster family homes, and not to child-care institutions. Congress quickly remedied this gap in the following year. But, at any rate, it is

clear that the lack of shared funds for foster children was the "sole purpose" for enacting the foster care amendment in the first instance, so that children previously not covered under the federal program could be eligible for federal assistance.

In offering a further amendment to the Social Security Act in 1962, which proposed to bring child-care institutions into the foster-care program and to make the program permanent, Senator McCarthy noted that under the basic ADC program, the federal government was participating in "an extensive program to assist children living in their own homes or in the home of a close relative." 108 Cong. Rec. 12692 (1962) (Remarks of Sen. McCarthy). The further remarks of the Senator show the distinction between these homes and the foster homes covered by the 1961 amendment as follows:

> Last year the Congress adopted a temporary measure to provide Federal participation for a very small percentage of children in foster homes—for those children removed from their homes by court order and placed in a foster family home. This legislation gave the States an alternative to leaving children in unsuitable homes—but where they would be eligible for Federal-aid-to-dependent-children payments—and permitted the States under limited circumstances to place them in foster family homes and *still be eligible for payments*. Both the bill approved by the House and the Finance Committee bill now propose to make this temporary measure a permanent provision. (108 Cong. Rec. 12692 (1962) (emphasis added).

These remarks show that Senator McCarthy as well understood a foster home to be an unrelated home, since aid had been available prior to 1961 for a child placed with a relative. The Senator also read an excerpt of testimony given by the secretary of the welfare committee of the National Association of County Officials before the Committee on Finance, which unmistakably shows that the Association likewise, and the Committee on Finance, regarded foster homes as unrelated homes. This testimony specifically notes that until 1961, "*all* children in foster homes could truly be classified as American forgotten children with respect to federal programs," for the reason that "[c]hildren in foster homes were not eligible for Federal participation under the aid-to-dependent-children program." The reference to "children in foster homes" could not have included related children, who were certainly eligible for federal assistance before 1961.

All of the above comments, along with those previously set forth in the defendants' brief, conclusively show that foster care was not considered to be related care when the foster care program was enacted. Nothing has been subsequently added to the language of the foster care provision to indicate that Congress later abandoned its policy of treating child care by parents and relatives separately from foster care.

D.

The Plain Meaning Of § 408 Indicates That Foster Care Means Non-Related Care.[4]

Section 408(a) when properly read demonstrates Congress' intention to provide assistance to a group of children not previously covered by AFDC—those children living with unrelated caretakers. It also clearly, if implicitly, defines foster care as unrelated care. Section 408 defines the class of "dependent children" eligible for assistance under its provisions as follows:

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4. For clarity, the statutory sections in this portion of the brief will be identified by the numbers used in the Social Security Act.

> (a) the term "dependent child" shall, *notwithstanding section 606(a)* of this title, *also include* a child (1) who would meet the requirements of such section 606(a) . . . *except for his removal . . . from the home of a relative* (specified in such section 606(a)) as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child, . . . (3) *who has been placed in a foster family home . . .* (emphasis added)

The italicized phrase "notwithstanding section 606(a)" states literally that the term "dependent child" shall be defined in § 608 "notwithstanding" or, in spite of, the definition of that term contained in § 606(a). The next italicized phrase "also include" supports this interpretation and the words themselves indicate further that the term "dependent child" is changed in § 608 to include a "dependent child" not previously covered under the definition contained in § 606(a). The only children included in the definition of "dependent child" contained in § 606(a) were those children who lived with specified relatives. It is plain then that under § 608 the definition of "dependent child" was changed to include children who did not live with specified relatives. This construction is further reinforced by Congress' use of the italicized phrase in § 608(a)(1) "except for his [the child's] removal . . . from the home of a relative."[5]

This construction that the new caretaker in the new home must be unrelated to the child is reinforced by examining § 608(a)(3). Section 608(a)(3) reads as follows:

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5. This assumption that the definition of "dependent child" was changed to include care in the home of a non-relative is valid because related care has always been provided for under § 606 whether or not that care was provided subsequent to the removal of the child from his parents' home by court order.

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, also include a child . . . (3) *who has been placed in a foster family home.*

Similarly, § 608(b) changes the definition of "aid to families with dependent children" to encompass a class of families not previously eligible for AFDC assistance—families unrelated to the children for whom they care. This term is defined in § 608(b) as follows:

> (b) the term "aid to families with dependent children" shall, *notwithstanding section 606(b)* of this title, *include also foster care in behalf of a child described in paragraph (a) . . .* (emphasis added)

Section 606(b) referred to in § 608 describes aid which may be given "to meet the needs of the *relatives* with whom any dependent child is living . . ." (emphasis added) If § 608(b) defines "aid to families with dependent children" notwithstanding the provisions of § 606(b), it must be interpreted as meaning aid to families unrelated to the dependent child, since § 606(b) means aid to related families. It also stands to reason then that "foster care in behalf of a child described in paragraph (a)" is care rendered by a non-related caretaker because the child described in § 608(a) is one who has been removed from the home of a specified relative who would have been eligible for assistance under § 606(a) except for his removal from that relative's home.

Finally, § 608(f) requires a state to attempt to make the home from which the child was removed suitable for return or to make the home of a relative specified in § 606(a) available for placement so that the child can be removed from foster care. If related care were foster care, there would be no need for such a requirement because the child would be, in fact, living in the home of a relative specified in § 606(a) and the goal of § 608(f) "to otherwise make

possible his being placed in the home of a relative specified in section 606(a)" would be satisfied.

It is respectfully submitted that the plain meaning of the terms employed by Congress in § 608 to define "dependent child" and "aid to families with dependent children" clearly indicates that the children described and the families with which they live are not related to each other. "Foster family home" as employed in § 608(a)(3) must mean a home different than the home described in § 606(a) because a child will be eligible for aid under § 608 "notwithstanding" the fact that he does not live in a home specified in § 606(a). Again, the only homes specified in § 606(a) are relatives' homes. If a child is eligible for aid notwithstanding the fact that he is not living in a relative's home, he must be living in a non-relative's home, and a foster family home must be an unrelated caretaker's home.

II.

THE POSITION TAKEN BY THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE IN THIS CASE IS CONTRARY TO FEDERAL LAW AND SHOULD NOT BE FOLLOWED.

Plaintiffs state that the interpretation of a statute by an agency is a substantial factor to be considered in construing the statute, even if the agency's interpretation is "not the only reasonable one." (Pl. Br. p. 65) While plaintiffs' statement of the law is correct, it is respectfully submitted that an administrative regulation is not reasonable at all if it conflicts with the specific mandate of Congress. This Court has refused to give administrative rulings *any* weight when they are inconsistent with federal statutes. *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 453 (1971). The Program Instruction recently adopted by HEW is contrary to the Social Security Act and should not be followed.

As previously discussed in the defendants' brief, HEW's new policy stated in Program Instruction APA-PI-75-9, contravenes the position previously taken by HEW. Plaintiffs seek to construe HEW's 1971 statement as an ill-advised employee's statement; as a "deviant interpretation of national policy by a local official." (Pl. Br. p. 67, fn. 43) Plaintiffs' position amounts to little more than an assertion that HEW does not always mean what it states. Plaintiffs seem to be arguing that the State of Illinois erred by first asking HEW, the agency charged with the duty of administering the Social Security Act, for its position as to the foster care program, and then by taking HEW at its word.

In addition, referring to pages 18-19 of the Solicitor General's brief submitted to this Court, plaintiffs assert that HEW had informed individual states prior to 1974 that otherwise eligible children placed in relatives' homes were eligible for the foster care program. However, pages 18-19 of the Solicitor General's brief make reference to the inconsistent interpretation of § 408 sent to Illinois officials by a regional HEW official. It then simply states that "other states were informed prior to 1974 that foster care by relatives *was* included within the AFDC-FC program, and matching funds were made available to these states." Even if this were true, the State of Illinois was apparently never notified of HEW's changed position after 1971 and prior to 1974, as is evidenced by the letter written by a state official and dated December 22, 1976, which asks HEW to articulate its position on this matter. (See U.S. Br., App. 1a-4a)

Clearly, past HEW policy statements did not include the plaintiff class within the foster care program and, in fact, HEW policy statements specifically contradicted HEW's present Program Instruction. Furthermore, as has

been fully discussed, HEW's revised policy contradicts its own published regulations which indicate that parents and relatives are eligible for AFDC assistance, whereas any other individual and child-care institutions are eligible for AFDC-FC benefits. (See State Br. pp. 34-37) As noted, these official regulations have not been amended since the issuance of the 1974 Program Instruction.

Above all, the recent HEW position taken in its Program Instruction, whether or not that position is consistent with past policy, is erroneous and should not be followed.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully urge this Honorable Court to reverse the judgment of the court of appeals which enjoined the enforcement of the Illinois statutes insofar as they exclude persons related to foster children from eligibility under the foster care welfare program, on the ground that these statutes violate the Social Security Act and the supremacy clause of the United States Constitution.

Respectfully submitted,

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